UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NATIONAL HOT ROD ASSOCIATION, Respondent, -and- INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES MOVING PICTURE TECHNICIANS, ARITISTS AND ALLIED CRAFTS OF THE UNITED STATES, ITS TERRITORIES AND CANADA, AFL-CIO, CLC (IATSE) Petitioner and Charging Party.	Case Nos. 22-RC-186622 02-CA-185569 22-CA-192686 22-CA-190221

IATSE'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS

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Pursuant to Section 102.46(d)(1) of the National Labor Relations Board's Rules and Regulations, by and through its undersigned counsel, Petitioner/Charging Party International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, Its Territories and Canada, AFL-CIO ("IATSE" or "Union"), hereby submits this Answering Brief in response to Respondent, National Hot Rod Association's ("NHRA" or "Respondent") Exceptions to the Administrative Law Judge's Decision ("ALJD").

PRELIMINARY STATEMENT

Television production crew employees who bring live automobile drag races to TV audiences formed a union because they were not being treated justly at work. Their employer, NHRA, a sanctioning body for motorsports drag racing, hired the crew to help produce national television coverage of its drag races beginning in 2016. NHRA's televised racing season began in early February 2016. By August the employees, unhappy with their working conditions, began signing IATSE union authorization cards.

The Respondent quickly sought to put the brakes on the Union's organizing effort. NHRA's executives started visiting employees at racetracks around the country, and amid the roar of racecar motors, asked whether NHRA could "fix" whatever problems the employees might have and thereby stem the Union's activity. In its haste, NHRA also created an unlawful impression that the employees' union efforts were under surveillance. Then, after the IATSE filed a representation petition with the Board, NHRA responded by withholding future offers of employment because of the pending election. In a decision dated November 9, 2018, the

Administrative Law Judge ("ALJ")[1] found that all these actions amounted to commonplace violations of Section 8(a)(1). In addition, NHRA shifted into overdrive when it abruptly discharged an experienced employee who was leading the Union campaign. The ALJ found in his well-reasoned decision that the discharge violated Section 8(a)(3). NHRA perfectly timed the discharge to occur during the peak of union activity. The ALJ's decision explains in detail the facts and reasoning supporting these conclusions that in relevant part NHRA violated the Act.

Meanwhile, the parties stipulated to a mail ballot election and the Union prevailed. Only one ballot currently remains under challenge—the ballot of the discharged employee, Nathan Hess. However, in this consolidated representation and unfair labor practice case, NHRA objects to the conduct of the mail ballot election (which it voluntarily agreed to). Agents of the National Labor Relations Board's Regional office conducted the mail ballot election here following every appropriate protocol. The Board's agents did everything proper to ensure that employees were given a reasonable opportunity to vote. There were no irregularities that would provide a basis for overturning the election results. No reliable evidence supports NHRA's speculative objections. The facts here, as described below, do not call for a rerun. The IATSE should be certified by the Board in accordance with the ALJ's decision. In other words (as the ALJ concluded) NHRA utterly failed to meet its burden of proving that the election results should be overturned.

[1] References to the hearing transcript (from various dates between December 7, 2017 and March 13, 2018) (the "Hearing") appear as "Tr. __." Exhibits introduced by the Petitioner during the Hearing are referenced as "Pet. Ex.__." Counsel for the NLRB General Counsel's exhibits are referenced as "GC. Ex. __." Employer exhibits are referenced as "Resp. Ex. __." References to the Employer's Exceptions appear as "Excep. ¶ __." References to the NHRA's Brief in Support Exceptions appear as "Resp. Br. at _." Citation to the ALJD appear as "ALJD p. __.

NHRA's Exceptions should be wholly denied. The ALJ properly found that NHRA violated the Act during the Union's organizing effort. His decision is well-supported by the totality of the evidence and should be sustained. Nothing within the Respondent's Exceptions or supporting brief plausibly calls the Judge's credibility determinations, factual findings, or legal analysis into question. NHRA's exceptions should be denied and the ALJ's decision sustained.

MATERIAL FACTS

NHRA is adrag racing association that sanctions thousands of automobile drag racing events in the United States every year at professional and amateur levels of competition. (Resp. 5.) NHRA's premiere series for professional drag racers is the Mello Yello Drag Racing Series. (*Id.*) Generally, every two weeks the series travels to another city in the United States and drag racers compete in a weekend-long competition. (GC Ex. 18.) A complete season, which runs from February to November, includes 24 races. (*Id.)*

Up until the 2016 racing season, NHRA drag racing events in the Mello Yello series were produced and aired on television by ESPN. (Tr. 232:9-13.) Beginning with the 2016 season, NHRA elected to hire its own television production crew, and develop and produce its own drag racing coverage, which aired on Fox Sports Networks. (Tr. 232:12-18; GC Ex. 5.) Racing events span the country and (though they are freelance employees) production crew members traveled to every racing destination to produce NHRA events for television. (Tr. 212:5-213:24).

During the first few months of the 2016 racing season, production crew members became dissatisfied with NHRA's working conductions and voiced various complaints to NHRA management. (Tr. Tr. 254:22-25—255:1-4; 390:15-22). Crew members' dissatisfaction continued and by early August, Union Representative John Culleeny received a call from a friend about the NHRA production crew. He met with production crew employees in

Washington State during the first weekend in August where they were working on an NHRA telecast. (Tr. 167:1-20; 258:17-22.) After that weekend, Union representatives stayed close to the crew and continued to meet with crewmembers at subsequent race events. Tr. 171:10-15; 261:18-24; As early as the beginning of August employees were signing IATSE authorization cards, and they continued to support the Union thereafter. (Tr. 259:17-18).

Beginning in September 2016 (as the General Counsel alleged and the ALJ found) NHRA began unlawfully interfering with the crew members' right to organize. The Respondent's executive-level management personnel—including its vice president of human resources, Marleen Gurrola and CEO Peter Clifford—visited racing events. (Tr.401:17-18.) At a race in Charlotte, North Carolina, Gurrola delivered a speech to employees in which she let them know that their union activities were under surrveillance (Tr. 402:14-17; GC Ex. 26A-B.) At the Charlotte race, Gurrola also visited small groups of NHRA employees where she asked them what issues they were having with work. (Tr. 119:18; 405:19-21; 406:7-14.) Gurrola wanted employees to come to her and let NHRA try to "fix" things. (Tr. 402:19-02.) The Respondent made its position against unionization known to employees in emails and a video message distributed to employees. NHRA routinely urged employees to vote "no" on union representation. (Pet. Ex. 3-5; GC Ex. 11). More remarkably, on the eve of the election, the Respondent circulated an email to employees stating that it was withholding job offers for the following (2017) NHRA racing season because of the Union election. (GC Ex. 6.)

NHRA's anti-Union campaign culminated with its unlawful discharge of unit employee Nathan Hess. Hess worked as the tape producer or replay producer on telecasts of NHRA's premier drag racing series. (Tr. 226:1-6.) He was active in the Union's campaign around the country. (Tr. 258:16-21.) Hess signed a union authorization card in August 2016. (GC Ex. 23.)

He took an active role generating Union organizing support among coworkers. (Tr. 260:19-24.) In fact, Hess was one of two leaders of the Union campaign and was practically "running the group." (Tr. 172:24-173:1.) He spoke regularly at Union meetings and talked to coworkers about the Union in the hotels where they were lodged by the Respondent and at the workplace. (*Id.;* 260:19-24; 173:20-22.) He invited other NHRA television crew employees to Union meetings and distributed Union authorization cards. (Tr. 262:11-25; GC Ex. 24.)

Hess had no negative prior work history nor any previous disciplinary record. He had years of experience working on drag racing telecasts. (Tr. 232:18-25—234:1-19). Hess never received complaints, warnings or reprimands about any aspect of his work. (Tr. 275:24-276:10.) To the contrary, his colleagues repeatedly told him that they liked his work. (Tr. 276: 11-14.) Nonetheless, NHRA discharged Hess around September 14, 2016 because of unspecified issues that occurred at a 2016 NHRA race in Indianapolis. (Tr. 274:9-10, 24-25.) The major issues surrounding the Indianapolis race stemmed from an equipment failure involving a device called the Xfile 3. (GC Ex. 25.) That equipment had recurring problems throughout the 2016 racing season. (Tr. 273:7-10.) Hess tried to fix the problems with the Xfile 3 in Indianapolis with no luck. (Tr. 271:22-25.) Hess also relied on the mobile broadcast truck engineer to fix the equipment, since it was the engineer who would be responsible for doing so. (Tr. 270:25-271:3.) Nonetheless, NHRA claimed it discharged Hess because of Hess's alleged failure to load video clips that were unavailable for replay due to the Xfile 3's failure. (GC Ex. 5 at 6.) This was despite Hess's diligence in notifying NHRA's managers that an equipment failure was preventing video segments from loading. (Tr. 269: 2-11.) Remarkably, before his termination, NHRA had given Hess a pay raise. (Tr. 227:5-8.) NHRA's claimed reason for Hess's discharge

is further weakened by this fact since NHRA was apparently implementing a cost-savings plan around the time of his discharge in September 2016. (E.g., GC Exs. 2-3.)

Meanwhile, the Union filed an NLRB election petition and the parties entered into a stipulated election agreement in 22-RC-186622 on November 2, 2016. The Acting Regional Director for Region 22 approved the agreement on November 3, 2016. (Pet. Ex. 2.) The parties agreed that ballots would be counted on December 2, 2016. Further, the Agreement provided that the voters "must return their mail ballots so that they will be received in the National Labor Relations Board, Region 22 office by 5:00 p.m. on Wednesday, November 30, 2016." (*Id.*) The Agreement specified that, "[i]f any eligible voter does not receive a mail ballot or otherwise requires a duplicate mail ballot kit, he or she should contact the Region 22 office by no later than 5:00 p.m. on Tuesday, November 22, 2016 in order to arrange for another mail ballot kit to be sent to that employee." (*Id.*)

The Respondent agreed to distribute an NLRB Notice of Election in accordance with the Board's standard practices, and "[a]ll procedures after the ballots are counted shall conform with the Board's Rules and Regulations." (*Id.*) The Stipulated unit consists of

> All broadcast technicians employed by the National Hot Rod Association ("NHRA") including technical directors (TD Technical Director), associate directors (AD Associate Director, AD Satellite Feed), assistant producers (PRO Pit Prodt1cer, PRO Video Board), camera operators (HC Hard Camera, HH Handheld Camera), audio technicians (A1 Audio Lead), audio assists/assistants (A2 Audio Assist, SUB Sub Mixer), replay producers, videotape operators, digital recording device operators (EVS Replay Operator), video technicians (V1 Senior Video, V2 Video Operator), video technician assistants (Video Assist), graphics operators (VIZ Graphics Operator), graphics coordinators (GPSC Graphics Coordinator), bug operators (Bug Operator), runners (RNR Runner), and utility technicians (UTE Utility) performing work in connection with telecasting of live or recorded racing events at remote locations; but

> excluding all office clerical employees and professional employees, guards, and supervisors as defined in the Act, and all other employees.

(*Id.)*

The Respondent provided its voter list to the Union on November 7, 2016. It identified approximately 100 voters in the stipulated bargaining unit. (Pet. Ex. 6.) In accordance with the Stipulation, the initial tally of ballots was conducted December 2, 2016. (Pet. Ex. 10.) It showed 33 votes in favor of the Union, 22 votes against representation and 17 challenged ballots, a determinative number. (Pet. Ex. 10.)

Pursuant to Section 102.69 of the Board's Rules and Regulations, the parties filed objections to the election with the Regional Director on December 9, 2016. While both parties filed objections initially, the Union's sole objection was subsequently withdrawn. NHRA's December 9, 2016 objections were consolidated with the NLRB General Counsel's unfair labor practice Complaint in the present case.

On August 4, 2017, the Regional Director for Region 22 issued a letter ordering resolution of a vast majority of the challenged ballots. Pursuant to the terms of the Regional Director's August 4, 2017 order, Region 22 conducted a supplemental tally of ballots on August 16, 2017 where it counted the ballots of 14 previously challenged voters. Region 22 issued a revised tally, which showed 35 votes in favor of the Union, 34 votes against representation, and two remaining undetermined challenges. (Pet. Ex. 11.)

Following issuance of the revised tally, on September 8, 2017, the Regional Director for Region 22 issued an Order Further Consolidated Cases, Partial Decision on Objections, Order

Directing Hearing and Notice of Hearing on Challenged Ballots and Objections and this matter was heard before the ALJ on several dates between December 7, 2017 and March 13, 2018.

The Respondent pursued objections at the hearing involving four voters—Robert Logan, Todd Veney, Pat Ward, and Paul Kent. NHRA alleged that these four voters did not cast a ballot because they experienced alleged problems in connection with their receipt and return of ballots. However, the Board's records indicate that it did everything it reasonably could to give them an opportunity to vote. The Board provided duplicate ballots to each voter upon request.

Logan, NHRA alleged did not receive a ballot kit "for about four or five days" and when he called the NLRB to inquire about it, Region 22 was nonresponsive. (Tr. 38:19.) However, the Board sent Logan a duplicate ballot on November 28, 2016 in response to his request. (Resp. Ex. 3.) Nonetheless, Logan never voted at any time before or after the ballot deadline of November 30, 2016. (*Id.*) Ward, requested multiple duplicate ballots. (Resp. Ex. 10.) The Board responded to his multiple requests by mailing him duplicate ballots on November 23, 2016 and November 29, 2016. (Resp. Ex. 3). Kent requested a duplicate ballot on November 25, 2016—after the date specified in the election notices for requesting replacement ballots. (Resp. Ex. 10.) The Board responded by mailing him a duplicate ballot on November 29, 2016. (*Id.)* Veney, NHRA alleged, returned his ballot on November 28, 2016 using a special postal delivery method, which estimated an *expected* two-day delivery. (Resp. Ex. 1.) Yet, Veney's ballot did not arrive in Region 22 until December 5, 2016 (the next business day after the December 2, 2016 tally). (Resp. Ex. 3.) There is no evidence that the Board or its agents interfered with the delivery or receipt of Veney's ballot. In fact, NHRA's objections fail to plausibly allege any specific misconduct by the Board or its agents in connection with the ballots of these voters.

ARGUMENT

I. THE ALJ PROPERLY RECOMMENDED OVERRULING NHRA'S ELECTION OBJECTIONS. [Excep. ¶¶ 1 -17]

As set forth in the ALJ's detailed decision based on the thorough record, NHRA did not meet its heavy burden of proving that the election should be set aside, and a second election conducted. The Respondent's exceptions to the ALJ's decision broadly attack the ALJ's fact determinations and legal conclusions. However, as described below, the ALJ's findings and conclusions are well-supported by substantial evidence. NHRA's speculative claims that the election was unfair must be rejected. The Board will not set aside an election where there is adequate notice and opportunity to vote and employees are not prevented from voting by the conduct of the election or by a party. As described below, the employees in this case had adequate notice and opportunity to vote (nearly three-fourths of the eligible voters voted) and no one was prevented from doing so by the Board's conduct.

A. The ALJ Applied the Correct Standards When Reviewing NHRA's Objections to the Mail-Ballot Election.

Representation elections are not lightly set aside. The "burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one." *Delta Brands, Inc.*, 344 NLRB 252, 253 (2005) (citations omitted); *Lockheed Martin*, 331 NLRB 852, 854 (2000). *See also NLRB v. Black Bull Carting Inc.*, 29 F.3d 44, 46 (2d Cir. 1994) ("A party seeking to overturn an election on the ground of a procedural irregularity has a heavy burden.") When alleging Board misconduct affected the election results—as NHRA alleges here—the facts must raise a reasonable doubt as to the fairness and validity of the election. *Polymers, Inc.*, 174 NLRB 282

(1969). As the ALJ found, NHRA fails to carry its heavy burden here. Its evidence does not show that the election results should be overturned.[2]

The appropriate question in these circumstances is whether employees had an adequate opportunity to vote. "When an employee does not vote for reasons that are beyond the control of a party or the Board, however, the failure to vote is not a basis for setting aside the election." *Waste Mgmt. of Northwest Louisiana, Inc.*, 326 NLRB 1389, 1389 (1998). Where the conditions that caused voter disenfranchisement are not attributable to a party or the Board objections will be overruled. *Sahuaro Petroleum*, 306 NLRB 586, 587 (1992) (Objections overruled where two employees were disenfranchised but "the conditions that caused the disenfranchisement" were not attributable to a party or the Board). When an election is conducted by mail, the Board will not overturn election results based on the vagaries of mail delivery. *J. Ray McDermott & Co. v. NLRB*, 571 F.2d 850, 855 (5th Cir. 1978), cert. denied 439 U.S. 893, 99 S. Ct. 250 (1978) ("It cannot be said that an election by mail is per se invalid whenever a potentially decisive number of votes . . . is lost through the vagaries of mail delivery.") *See also National Van Lines*, 120 NLRB 1343, 1346 (1958) (late-received ballots not counted where voters were not excluded by "any defect in the election procedures utilized, but rather [were] occasioned by their lack of diligence and interest in mailing their ballots on a date which would have assured their timely receipt")

[2] Before the ALJ, the Respondent claimed that ballots received after the tally should be opened and counted. The ALJ concluded the Board's rule on late received ballots does not permit that outcome. (ALJD p. 24, n. 23). The Respondent did not except to that conclusion and it is barred from doing so now. 29 CFR 102.46(a)(1). To the extent the Respondent now suggests in its Brief in Support of Exceptions, that ballots received after the tally should be counted, such claims must be disregarded. (Resp. Br. at 26.) Moreover, the Respondent admits that dissenting opinions in Board cases it previously cited in support of such a position are distinguishable and therefore inapplicable here (*Id.* at n. 20.)

For good reasons, the Board's well-settled standard does not require that each employee vote. Nor does it require perfection. *E.g., NLRB v. Duriron Co., Inc.*, 978 F.2d 254, 256-57 (6th Cir. 1992) (Election results are not set aside when a party alleges that the election "fall[s] short of perfection.") *Black Bull Carting*, 29 F.3d at 47. (not "sufficient for a party to show merely a 'possibility' that the election was unfair"). If perfect conditions were required, seldom would election results ever become final, because the losing parties could allege any hiccup requires a second run. This type of speculation would render mail balloting virtually unworkable. If the mysteries of mail delivery were to serve as the basis for overturning election results, practically no election conducted in whole or part by mail would ever be upheld.

Nevertheless, NHRA would require the Board to overturn the results of a mail ballot election every time eligible voters claimed (regardless of the totality of evidence) that they did not receive mail ballots or that they returned ballots to the Region and those ballots were not counted. The Respondent points to no authority for its contention that the Region was obligated to ensure that all potential voters actually cast ballots. Nor does NHRA find any Board support suggesting that additional safeguards were required here (aside from the duplicate ballot process, which is ordinarily followed and was followed here). (Resp. Ex. 3.) Overall, NHRA complains that the Board's standards under these circumstances present an "impermissibly heavy burden." (Resp. Br. p. 34.) Those standards are long-standing and were appropriately applied by the ALJ here. NHRA offers no plausible grounds for diverging from the Board's settled norms here.

B. The Board's Regional Office Conducted the Election Without Irregularity or Misconduct.

Applying the above principles to the present case, the ALJ found that four employees, who were alleged to be eligible voters, were not denied the opportunity to vote by the Board's Region 22. The Regional Office's handling of ballots (or requests for duplicate ballots) were not

mismanaged. NHRA offers nothing more than speculation to allege otherwise. The ALJ found voters' lack of diligence, if anything, excluded their ballots from the tally. These factual and legal conclusions concerning the NHRA's objections are correct and well-supported.

The Region's conduct cannot be called into doubt because the evidence overwhelmingly shows that the Region followed its ordinary procedures. Region 22 mailed ballots to voters on the Respondent's voter list on November 15, 2016, in accordance with the parties' stipulated election agreement. (Resp. Ex. 3; Pet. Ex. 1.) The ALJ's finding that ballots were timely mailed is thus well-supported by unrebutted evidence. NHRA's claim that ballots were not timely mailed on November 15, 2016 amounts to rank speculation and its claim must be rejected. (Excep. ¶ 2.) The election cannot be overturned based on NHRA's unsupported assumptions otherwise.

Region 22 mailed a replacement ballot to every individual who requested one. (Resp. Ex. 3.) While the Respondent speculates about the Region's handling of duplicate ballot requests, it has not meet its burden of proving the election results should be overturned. Importantly, employees who were allegedly disenfranchised failed to comply with the terms of the Stipulated Election Agreement concerning duplicate ballot requests. The ALJ found that Robert Logan first attempted to contact Region 22 on November 23, 2016 and Paul Kent first tried to contact Region 22 on November 25, 2016. These conclusions are supported by the evidence. (Tr. 600:180-602:23; Resp. Ex. 10.) However, the Stipulated Election Agreement (which NHRA signed) specified that, "[i]f any eligible voter does not receive a mail ballot or otherwise requires a duplicate mail ballot kit, he or she should contact the Region 22 office by no later than 5:00 p.m. on Tuesday, November 22, 2016 in order to arrange for another mail ballot kit to be sent to that employee." (Pet. Ex. 2 (emphasis added).) The Board will not sustain a

challenge to the mail ballot procedures of the Region when the parties—as in the present case—stipulated to the duplicate-request process and a party later dislikes it. *Community Care Systems, Inc.,* 284 NLRB 1147, 1147 (1987). The mechanics of the mail ballot election, including the duplicate-ballot request deadline described above were agreed-upon by NHRA when it entered into the Stipulated Election Agreement. It cannot now criticize those details as unfair. *Id.*

NHRA relies on the Board's Casehandling Manual, which NHRA asserts sets forth so-called "requirements" imposed on the Board. NHRA mischaracterizes the Casehandling Manual. In Casehandling Manual: Representation Proceedings, Sections 11336.2(c) and 11336.3, the Board notes that, a "designated Regional Office employee named on the notice of election as the contact person should be an individual who is readily available in the event voters attempt to contact him/her." (emphasis added.) The Casehandling Manual is not binding authority on the Board. *E.g., Superior Industries*, 289 NLRB 834 (1988). Thus, NHRA's claims that the Region's conduct was objectionable because it did not comply with the NLRB's Casehandling Manual lack merit.

NHRA's claim that a phone number at the Regional office was "unmanned" was similarly immaterial and properly disregarded by the ALJ. (Resp. Br. at 33.) NHRA relies solely on hearsay testimony to claim that a Region 22 phone number was "unmonitored." The ALJ was entitled to give such evidence the weight it deserves. *E.g., Daikichi Sushi,* 335 NLRB 622, 623 (2001). This contention is further minimized (as the ALJ expressly found) because voters had multiple NLRB telephone numbers to choose from, which were published in the election notices and instructions—973-645-2100; 862-229-7038; and 866-667-NLRB. (ALJD 26; Pet. Ex. 1.) According to hearsay testimony one of these phone lines was "unmonitored," *after* the November 22, 2016 deadline for requesting duplicate ballots. (Pet. Ex. 2.)

In sum, NHRA has offered no sufficient evidence that the conduct of the Board Agents compromised the integrity of the election process. Accordingly, its objections must be overruled as the ALJ correctly concluded.[3]

i. *The ALJ's Conclusions Concerning Todd Veney's Ballot Must be Upheld.*

The ALJ concluded, based on the credible evidence, that Todd Veney, an alleged eligible voter was not prevented from voting by the Board's "mail intake process." (ALJD p. 25-26.) This conclusion is amply supported by substantial evidence. The ALJ properly concluded, that Veney's ballot was not timely returned and therefore could not be counted at the December 2, 2016 tally. (*Id.*) NHRA did not meet its burden of proving that the Board was at fault for the any problems surrounding Veney's ballot. (ALJD p. 26.) Rather, NHRA only speculated that the Board was at fault. (*Id.*) This conclusion is supported by the facts.

Veney mailed his ballot with *expected* two-day delivery on November 28, 2016. (See Resp. Ex. 1) (emphasis added). There's no evidence establishing what (if anything) happened to the ballot between November 28, 2016 and its supposed December 5, 2016 receipt by the Board's Regional Office. (ALJD p. 25-26.) Accordingly, NHRA did not meet its burden. The "vagaries of mail delivery" do not provide sufficient proof of election irregularities. *J. Ray McDermott & Co. v. NLRB*, 571 F.2d at 855.

[3] Since NHRA failed to meet its burden of showing that the election should be set aside, a voter-by-voter analysis of the Employer's allegations is unnecessary. *See e.g., Kirkstall Road Enterprises, Inc.*, 02-RC-23547, 2012 NLRB LEXIS 512, *1 (Mar. 30, 2011). Where a party objected to the Board's conduct of the election, the "Employer, as the objecting party, must show Board agent misconduct." *Id.* at *2. If it fails to do so, the Board need not make voter-by-voter findings about individual experiences with the election processes. *Id.* at *6. Even where an objecting party, "introduced testimony from some voters whose ballots were not counted" such testimony, "without more, fails to sustain the Employer's burden of proof to show" that alleged Board misconduct affected the fairness and validity of the election. *Id.* at *5. Nonetheless the ALJ's findings, resolutions, and conclusions are appropriate and well-supported as described here.

The expected delivery date for Veney's ballot to Region 22 was December 1, 2016. (*Id.*) The Election Notices stated that "voters must return their ballots so that they will be received in the [Board's] Region 22 office by 5:00 p.m. on Wednesday November 30, 2016." (Pet. Ex. 1 at p.3.). Veney could not have reasonably expected his ballot to be delivered before the November 30, 2016 ballot deadline. The Board already "permits acceptance of mail ballots arriving after the date they are due, whatever the reason for the delay, as long as they are received before the scheduled ballot count." *Classic Valet Parking, Inc.,* 363 NLRB No. 23 slip op at *1 (2015). Here, however, Veney did not mail his ballot promptly enough and it did not arrive in time. Under these circumstances the Board's settled rules (applied by the ALJ) these circumstances are not objectionable. *Id.*

Finally, there is no evidence as to when Veney's ballot arrived at his home because he decided to leave home "for Thanksgiving" on an unspecified date and then when he "got back from Thanksgiving" his ballot "was there." (TR 28:1-2; 30:9-10). Veney never contacted the Board—at any point—to request a duplicate ballot. Veney's ballot was obviously delivered to his residence when he was away, during an unspecified period, "for Thanksgiving." (*Id.*) The Board has long held that the results of an election will not be set aside where voters fail to cast valid mail ballots due to their lack of diligence. *National Van Lines,* 120 NLRB at 1346 (1958) (voters were excluded by "their lack of diligence and interest in mailing their ballots on a date which would have assured their timely receipt"); *Monte Vista Disposal Co.,* 307 NLRB 531, 534 (1992) (absent extraordinary circumstances, voters who do not cast timely ballots due to their own negligence will not have their votes counted). Had Veney wished for his ballot to arrive on time, he could have utilized another form of delivery. Thus, here as in other circumstances, Veney's own negligence prevented his ballot from arriving at Region 22 before the tally. There is no

unfairness in the Board's election procedures when "employees failed to vote, not because they lacked an adequate opportunity to participate in the balloting, but because they chose to wait until the final minutes . . ." *Lemco Construction, Inc.*, 283 NLRB 459, 460 (1987). Here, there is no evidence whatsoever that the Board's or its processes prevented Veney from voting. It was his own delay.

ii. *Robert Logan's Failure to Cast a Timely Ballot Was Not Attributable to the Board.*

Robert Logan never voted. His failure to do so was not the Board's fault. There are substantial evidentiary factors underpinning that conclusion. The ALJ concluded that Logan failed to call Region 22 for a replacement ballot before the deadline for doing so. (ALJD 26.) The ALJ concluded that Logan called only one single NLRB telephone number despite having multiple available telephones numbers at his disposal. (*Id.*) That conclusion is supported by concrete evidence. (Pet. Ex. 1.) He also failed to email any of the Board's agents despite receiving their email addresses from the Respondent. (Pet. Ex. 2.) Ultimately, the Region still sent Logan a replacement ballot pursuant to his request, on the next business day following his November 25, 2016 call to Region 22. (Resp. Ex. 3.) Furthermore, the ALJ credited the testimony of employee Nathan Hess, who was able to request a replacement ballot and receive a one in time to return it for the tally. (Tr. 281:9-282:7; Pet. Ex. 6; Resp. Exs. 3, 10.) On the other hand, Logan made insufficient efforts to cast his ballot. (ALJD 26.)

The ALJ, based on the totality of facts, found that no Board lapse caused Logan's failure to vote Board. (ALJD 26.) Logan testified that he called *one* Region 22 telephone number set forth in the election notices, but notably, he did not contact the Board through its alternative national toll-free line. (Tr. 40:8-15.) He did not attempt to dial the alternative Regional office

number published on the mail ballot instructions. (Pet. Ex. 1 p. 6.) Nor did he make any other effort to contact the Region 22 Board agents.

Furthermore, Logan also testified that he lives with other family members. (Tr. 49:2-7.) He travels frequently for work (at times out of state) and is not the only household member who collects the mail. (Tr. 49:13-50:11.) He testified that sometimes mail is discarded immediately. (Tr. 50:6-9.) Considering all the testimony, persons mishandling mail within Logan's home—rather than any Board agent misconduct, as NHRA speculated—caused any election difficulties he experienced. Alternatively, Logan's experienced were akin to the vagaries of mail delivery rather than the actions of the Board or a party. *J. Ray McDermott & Co*. 571 F.2d at 855.

iii. *The ALJ Properly Rejected NHRA's Claims Concerning Paul Kent's Ballot.*

The ALJ concluded that Paul Kent was not disenfranchised due to Board conduct. (ALJD 26.) Kent claimed that he did not receive a ballot so he called the NLRB and requested a duplicate (after the deadline for doing so had passed). Region 22 sent him a duplicate ballot pursuant to his request. (Resp. Ex. 3.) These circumstances do not raise any legitimate doubts about the legitimacy of the election. The ALJ's conclusions concerning Kent are supported by substantial evidence.

Kent "believed" that he contacted the NLRB on an unspecified date by phone and email in order to inquire about a ballot. (Tr.195:12-13.) He did not produce the alleged email. Documentary evidence shows that Kent placed one phone call and did not speak with a Board representative. (Resp. Ex. 10.) The Board nonetheless sent Kent a duplicate ballot. (*Id.*)

Further, the ALJ's concluded that Kent was not able to retrieve his mail between November 25, 2016 (when he contacted the NLRB) and December 4, 2016 (after the tally of

ballots). (ALJD 26.) This conclusion is unequivocally supported by Kent's testimony. Kent testified that he was away for five or six days during the last week of November 2016 (when ballots were due). (Tr. 204:3-5; 7-8.) This was not the only time Kent was away from home during November 2016. (Tr. 204:12-14.) Kent also testified that when he is away for periods of time, someone else is checking his mail. (Tr. 204:10-11.) No credible evidence shows that Board misconduct prevented Kent from voting. (ALJD 26.) The ALJ's opinion is supported by a clear preponderance of all the relevant evidence here.[4] Here, Kent did not vote for reasons that were beyond the control of the Board—namely his own travel schedule, his irregular receipt of mail, or the mysteries of the postal service. Consequently, based on the totality of these circumstances, NHRA has not meet its burden of proving that the election should be set aside. *Waste Mgmt. of Northwest Louisiana, Inc.*, 326 NLRB at 1389. The ALJ's findings and conclusions concerning Kent's ballot should be upheld.

iv. *The Region correctly followed every approiate election procedure in connection with Patrick Ward's Ballot.*

The ALJ found that alleged eligible voter Patrick Ward was not prevented from voting by the Board's conduct. (ALJD 26.) the —who did not testify in the Hearing—requested duplicate ballots and returned one ballot that he received to the Board. It did not reach the Board until December 9, 2016. (*Id.*) The ALJ concluded that Ward was not disenfranchised by any of the

[4] Additionally, the ALJ correctly noted that Kent appeared with others, including NHRA's executives in an anti-union video distributed during the campaign. (ALJD 13.) The ALJ was unquestionably permitted to base credibility determinations on a witness's apparent bias. *E.g., Gibraltar Steel Corp.*, 323 NLRB 601, 601 n.4 (1997) (Adopting hearing officer's credibility determination in objections hearing where witnesses' "partisan interest ... general memory for detail ... conflicting testimony ... and self-serving answers" were noted.)

Board's conduct. Evidence introduced by NHRA fully support the ALJ's conclusions and findings.

The records show that Ward requested a duplicate ballot on November 22, 2016 (Resp. Ex. 10.) The Board responded by mailing Ward a ballot on November 23, 2016. (Resp. Ex. 3.) Ward then requested a ballot again on November 29, 2016. (Resp. Ex. 10.) The Board again responded by mailing Ward a replacement ballot on that date. (Resp. Ex. 3.) Ward mailed a ballot, which was postmarked on December 1, 2016—the day after the deadline for Region 22's receipt of ballots. (See Pet. Ex. 1.) Neither the Board nor any party prevented Ward from successfully voting. No Board conduct prevented Ward from casting a timely ballot. To the contrary, the Board took reasonable steps to give Ward an opportunity to vote. In sum, the circumstances surrounding Ward's ballot do not satisfy the Respondent's heavy burden of proving that the election should be rerun. NHRA's exceptions to the ALJ's conclusions concerning Ward should be rejected.

C. NHRA's Remaining Assertions Concerning its Objections to the Election Lack Merit and Should be Ignored.

Board agents are generally not called to testify in proceedings before Administrative Law Judges. In fact, the Board's Rules and Regulation prohibit Board agent testimony. Section 102.118(b) of the Board's Rules expressly prohibits testimony from regional NLRB agents absent specific permission from the NLRB's General Counsel. The Board's Deputy Associate Counsel in the Division of Operations-Management informed the parties that a request for Board agent testimony was denied. (Resp. Ex. 3.) As described, "Absent a showing of most unusual circumstances it is the policy of the Office of the General Counsel not to permit Board agents or other Agency personnel to testify as witnesses with respect to the processing of unfair labor

practice and representation cases." (*Id.*) made no appeal or request for further consideration the General Counsel's conclusion that Board agent testimony was not warranted. Nor did NHRA show "most unusual circumstances" justifying Board Agents' testimony here. Therefore, NHRA's exception concerning the ALJ's "failure to take into account the fact that Respondent was foreclosed from calling Board Agents to testify" should be categorically rejected. (Excep. ¶ 16.) Moreover, NHRA's preposterous suggestion that the ALJ should have drawn an "adverse inference" because no Board agent testified should be rejected. (Resp. Br. at 33.) The Board has long held this would be improper. *Independent Stations Co.*, 284 NLRB 394 n. 1, 412, 415 (1987).

The closeness of the election results has no bearing upon whether election results are fair and val*Id.* (*See* Excep. ¶17.) As the Board and courts have explained, the appropriate consideration is the degree of employees' participation in the election. In this case approximately 75% of the employees submitted ballots. (See Pet. Exs. 10-11.) In other recent case involving mail ballots, the returned ballots represented a "76% participation rate," *NCR Corp. v. NLRB,* 840 F.3d 838, 842 (D.C. Cir. 2016). That return rate, the *NCR* court noted, was greater than other cases where a party had failed to show that election results were invalid, despite allegations that some voters claimed they did not receive ballots *Id.* citing *Antelope Valley Bus Co. v. NLRB*, 275 F.3d 1089, 1095-96 (D.C. Cir. 2002). In *NCR*, the parties voluntarily entered into a stipulated election agreement, which explicitly included a well-defined ballot-return deadline. *Id.* at 840. The employer distributed election notices to employees detailing the mail ballot deadline. *Id.* at 841. A Board agent "opened and counted the. . . ballots received by the time of the count." *Id.* Nonetheless, the employer contended that the Board "should have counted the seven additional ballots that arrived" two days after the tally "because the postmark dates show employees sent

them in sufficient time for them to have been received" by the deadline. *Id.* There as here, NHRA has not proven any misconduct. As in the present case—the employer's "objections to the election stem … from a disagreement with the Board's policy on handling late-received ballots." *Id.* It has failed to meet its heavy burden of showing the election must be set aside. *Id.*[5]

The Board cases NHRA relies upon have no application here. In *Fessler & Bowman, Inc.*, 341 NLRB 932 (2004), for example, the Board questioned whether the integrity of a mail-ballot election was compromised when a union agent solicited and collected mail ballots. *Id.* at 932. NHRA makes no similar allegations in this case so *Fessler & Bowman* is inapplicable here. Similarly, misplaced is *Security '76,* 272 NLRB 201, 201 (1984). In that case, a significant number of ballots were "returned by the Postal Service as undeliverable." Here, no ballots were returned by the Postal Service as undeliverable. In *North American Aviation*, 81 NLRB 1046 (1949), the Board overturned an election when a "chain of" several egregious events taken together "create[d] a reasonable doubt" as to the fairness of employees' opportunities to vote in a mail ballot election (for example, the ballot return envelopes lacked postage). No such similar factors are present here.

In *Garda World Security Corp.,* 356 NLRB 594 (2011), the Board ordered a rerun election when a Board agent closed a manual polling site early and employees might have missed a chance to vote because of the agent's action. The present case did not involve manual polling. Nor does it include analogous circumstances since it is undisputed that the Board

[5] The ALJ also relied upon *Waste Management of Northwest Louisiana*, 326 NLRB at 1389. In that case, the tally of ballots was 18 for and 17 against the petitioner. *Id.* The Board nonetheless found that no party prevented a particular employee from voting. Thus, there was basis for sustaining an objection despite the narrow margin. *Id.* Plainly, by applying *Waste Management* here, the ALJ (contrary to the Respondent's contention) appreciated the "closeness" of the present election. (ALJD 15.)

counted all the ballots it received before the December 2, 2016 tally. (*See* Resp. Exs. 3, 10; Pet. Ex. 2.)

In *Star Baking*, 119 NLRB 835, 836 (1957), the Board directed a new election where an investigation showed that an eligible employee was "not furnished with a ballot" and therefore "did not have an opportunity to vote in the election." Here, however, the unrebutted evidence conclusively establishes that the Region sent a ballot (and many replacement ballots) to each person on the voter list. (Resp. Exs. 3, 10.) For similar reasons, *Oneida County Community Action Agency*, 317 NLRB 852 (1995) and *Davis & Newcomer Elevator Co.*, 315 NLRB 715, 715 (1994) are inapplicable here. In both those cases, the Board sustained objections where Board staff failed to distribute duplicate ballot kits to voters. That did not happen here. Again, in this case, the Board mailed duplicate ballots to all individuals who requested them.

Finally, NHRA finds no support for its exceptions in *Queen City Paving Co.*, 243 NLRB 71 (1979), which differs drastically from the present case. In *Queen City Paving*, a Board agent challenged the ballot of a voter who submitted his vote after the mail-ballot *deadline. Id.* at 73. (emphasis added.) The Board overruled the challenge, because the voter could have reasonably expected his ballot to arrive before the *deadline*. Here, the closing time for casting ballots—which the NHRA stipulated to—was November 30, 2016. (*See* Pet. Ex. 2 "Voters must return their ballots so that they will be received in … Region 22 office by 5:00 p.m. on Wednesday, November 30, 2016.") None of NHRA's evidence shows that voters could have reasonably expected their ballots to arrive before the November 30, 2016 deadline. (Resp. Exs. 1, 3, 10.) Thus, Queen City Paving offers no support for NHRA. Further, the Board's current practice renders *Queen City Paving* moot. Mail ballots arriving after the *ballot deadline* but before the *ballot tally* are counted. *Classic Valet,* 363 NLRB No. 23 slip. op at *1. In this case, the Board

followed that practice. There is no plausible contention that Region 22 failed to count ballots that it received before the December 2, 2016 tally.

II. THE FACTS AND EVIDENCE SUPPORT THE ALJ'S CONCLUSION THAT NHRA UNLAWFULLY DISCHARGED NATHAN HESS. [Excep. ¶¶ 1 -17.]

The ALJ correctly concluded that Hess was unlawfully discharged. (ALJD 24.) To the extent it takes exception to the ALJ's credibility determinations, NHRA's claims lack merit. The evidence fully supports the ALJ's credibility determinations. The General Counsel overwhelmingly proved its prima facie case and no *Wright Line* defense can save NHRA from the ALJ's correct conclusion that NHRA dismissed Hess unlawfully. (ALJD . The Board should adopt the ALJ's decision and recommended order in its entirety.

In determining whether a discharge violates the Act, the Board applies the framework set forth in *Wright Line*, 251 NLRB 1083 (1980). Under *Wright Line,* the General Counsel must first show that protected conduct was a motivating factor in the Respondent's decision. *See Hawaiian Dredging Construction Co.*, 362 NLRB No. 10, slip op. at 3 (2015). The elements that support such a showing are the employee's protected union activity, the employer's knowledge of that activity, and the employer's anti-union animus. *Id. See also Consolidated Bus Transit, Inc.*, 350 NLRB 1064, 1065–1066 (2007). Once the General Counsel has made this prima facie showing, the burden then shifts to the Respondent to prove that it would have taken the same action even if the employee had not engaged in protected activity. *Id.* Yet, if the Respondent's stated reason for the discharge is pretextual, it fails to prove that it would have taken the same action absent the protected activity. *Golden State Foods Corp*., 340 NLRB 382, 385 (2003). Where the asserted non-discriminatory reason is pretext, the Board will have no reason to apply the second part of the *Wright Line* analysis. *Id.*

Here, the General Counsel has established all the elements to show that the Respondent's decision to discharge Nathan Hess violated the Act. First, the evidence establishes that Hess was engaged in protected activities by attending Union meetings, openly supporting the Union organizing effort, distributing union authorization cards and speaking with co-workers about the Union. Second, the Respondent's knowledge that Hess engaged in Union activities can be easily inferred—based on evidence of general union activity and the relatively small workforce. Third, there is ample evidence that Respondent held significant animus against the Union. Finally, as mentioned below, the Respondent's reasons for discharging Hess were pretextual. Thus, the second part of the *Wright Line* test need not apply. In sum, Hess's discharge violated Sections 8(a)(1) and (3) of the Act.

Here, Nate Hess was a leader of the Union organizing campaign. Hess attended employee meetings for the purpose of discussing Union organizing activity and announced his support for the Union by signing a Union authorization card. These were protected activities under the Act. Engaging in discussions with his colleagues regarding the Union's organizing effort also falls squarely under the protection of Section 7. *See, e.g., Republic Aviation Corp. v. NLRB,* 324 U. S. 793, 798 (1945); *Ridgley Mfg. Co.,* 207 NLRB 193 (1973). The evidence plainly establishes that Hess engaged in activity protected under the Act.

Direct evidence is not necessary to establish the employer's knowledge of a discriminatee's protected activity. *Pan-Oston Co.,* 336 NLRB 305, 308 (2001) (It is "well established that, in the absence of direct evidence, an employer's knowledge of an employee's union activities may be proven by circumstantial evidence from which a reasonable inference may be drawn."). The Board will rely on a variety of factors in determining employer knowledge. *See Montgomery Ward & Co.,* 316 NLRB 1248, 1253 (1995), enforced, 97 F.3d

1448 (4th Cir. 1996). Here, several factors show that the Respondent had knowledge of Hess's protected activities.

First, there significant evidence that the Respondent had knowledge of the IATSE's organizing efforts prior to Hess's discharge. (Tr. 324:6-15.) The ALJ properly determined the "knowledge" element was satisfied here based on the available evidence. (ALJD 22.) *See, e.g., Lucky Cab Co.,* 360 NLRB 271, 275 (2014) ("pretext evidence . . . further warrants an inference that the Respondent was aware of the discriminatees' organizing activities"). Here, at the Indianapolis NHRA race around September 1, 2016, NHRA supervisors were aware that the Union was holding organizing meetings (Tr. 324:6-15; GC Ex. 18.) That knowledge of protected activity may be imputed to the Respondent. *See State Plaza, Inc.,* 347 NLRB 755, 756 (2006) (supervisor knowledge of union activities is imputed to the employer).

As the ALJ recognized, the Board may rely on either direct or circumstantial evidence to determine the presence of an unlawful motive leading to a discharge. "It is well established that a discriminatory motive may be inferred from circumstantial evidence and the record as a whole, and that direct evidence of union animus is not required." *Tubular Corp. of Am.,* 337 NLRB 99, 99 (2001) (citing cases). *See also Electronic Data Systems Corp.,* 305 NLRB 219, 219 (1991) ("[T]he Board may infer animus from all the circumstances.").

The abruptness and timing of the employer's adverse action will support a finding that union activity was the motivating factor in discharging a union supporter. *E.g., NLRB v. Joy Recovery Technology Corp.,* 134 F. 3d 1307, 1314 (7th Cir. 1998). (In determining whether anti-union animus was a substantial factor in employer's decision, "timing is everything."). *See also Toll Mfg. Co.* 341 NLRB 832, 833 (2004) (citing cases).

Here, the timing of Hess's discharge provides unusually strong circumstantial evidence of Respondent animus. As discussed above, Hess was discharged soon after he engaged in protected activity in Indianapolis. *See DHL Express, Inc.*, 360 NLRB No. 87 slip op. at 1 n. 1 (2014) (timing of discharge, one day after union activity, supported inference of animus). Second, Hess's discharge came as a complete surprise to him. He had been neither constructively nor negatively criticized for his work. He had not been warned about the consequences if he did not improve. And he was not given any opportunity to answer for any alleged shortcomings. The abruptness and timing of Hess's discharge offer compelling evidence that the Respondent harbored anti-union animus.

The Respondent's disparate treatment of Hess will also support an inference that it was motivated by union animus. *E.g. Int'l Metal Co.,* 286 NLRB 1106 (1987). Here, the evidence shows that no other employee was penalized, let alone discharged for the events in Indianapolis. That, coupled with Hess's prior positive work record, is also probative of the Respondent's unlawful motive. [6]

The Respondent's asserted reasons for discharging Hess are pretextual. NHRA's prior approval of Hess's work is demonstrated by the evidence here. Under similar circumstances an unexplained change in an employer's satisfaction with an employee's work supports a finding of pretext. *See Allegheny Ludlum Corp. v. NLRB,* 104 F.3d 1354, 1368 (D.C. Cir. 1997) (discharge

[6] Finally, there is direct evidence of employer animus in this case. NHRA supervisor Peter Skorich intended to "take care" of the Union. (Tr. 328:14-15.) This statement along other contemporaneous unfair labor practices provides sufficient evidence of animus. *Novartis Nutrition Corp.*, 331 NLRB 1519, 1520 (2000). Furthermore, the Employer's expressed interest in keeping its workforce nonunion further establishes animus (even though the precise expression of that desire was not unlawful). See *Gencorp*, 294 NLRB 717 fn. 1 (1989). Overall, the facts show the Employer had union animus and that Hess's discharge was unlawfully motivated. The Region should issue a complaint alleging that the Employer discharged Hess for unlawful reasons.

was unlawfully motivated where employer created negative, pretextual performance appraisals in spite of employee's positive reviews in each of the preceding three years).

Here, the Respondent cannot show that it would have taken the same actions against Hess without his Union activities. Hess, who voiced union support, was sacrificed as a message to the remaining workforce. The Respondent's explanations for his discharge were plainly pretextual. Accordingly, the Administrative Law Judge should find that Hess was discharged in violation of Sections 8(a)(1) and (3) of the Act based on the prima facie case described above.

III. THE ALJ'S FINDINGS THAT NHRA VIOLATED SECTION 8(A)(1) SHOULD BE UPHELD.

The ALJ found that, as alleged in the Complaint, NHRA violated Section 8(a)(1) of the Act in three significant ways: (a) by creating an impression that employees were under surveillance; (b) by soliciting employee grievances to "fix" them and stem the Union campaign; and by (c) withholding future work offers until the Union election were completed and potentially withholding such offers "indefinitely" if the Union prevailed in the election. (ALJD 18-21.)

NHRA's Gurrola, created an impression of surveillance and the ALJ's conclusion is supported by unrebutted, objective evidence. By unqualifiedly noting that she *knew* that employees had been talking to the union, Gurrola violated Section 8(a)(1). (GC Ex. 26A; 26B.) Under the Board's objective standard, this created an impression that NHRA was placing employees under close supervision. In so doing, NHRA created an unlawful impression among employees that their union activities have come under surveillance. *See New Era Cap Co.*, 336 NLRB 526, 534 (2001) *citing Laser Tool, Inc.*, 320 NLRB 105, 109 (1995). In *New Era* for example, the Board adopted an Administrative Law Judge's finding that an employer's

supervisors "changed the style and frequency of their observation of employees' nominal work functions." 336 NLRB at 526. This, the Board noted, would lead employees to "reasonably believe that they were subjected to this increased attention because of their" union activities.

Additionally, the evidence supports the ALJ's conclusion that Gurrola's questions to employees during the Union's organizing campaign amounted to an unlawful solicitation of employee grievances. Gurrola and others met in large and small groups and Gurrola asked crew members, in effect, if they had any complaints, concerns or problems. (*E.g.*, GC 26A-B; Tr. 406:6-25.) As the ALJ concluded, undisputed evidence shows that NHRA solicited grievances in response to the Union's organizing campaign with the implied promise to "fix" things (ALJD 18-19.) NHRA in fact then took steps to remedy, in part, some of these grievances (Tr. 407:14-25). The Respondent produced no credible evidence to suggest that it had a practice of soliciting grievances in this manner prior to the Union's organizing effort. The solicitation of these grievances violated Section 8(a)(1) of the Act. *See Ishikawa Gasket America Inc*., 337 NLRB 175 (2001).

Finally, the unrebutted evidence shows that NHRA violated the Act by withholding job offers from employees because of the Union election. On November 15, 2016, NHRA supervisor Mike Rokosa sent an email to NHRA employees, which stated that, "[b]ecause we are in the midst of a union election, our hands are tied as far as making offers for 2017. Once the votes are counted on December 2, if NHRA wins the election, we will be able to let you know promptly when we can schedule you to work during 2018, based on your availability and our needs." (GC Ex. 6.) Rokosa went further to state that "if the union wins the election, we will be obligated to bargain certain terms . . . and we do not know how long that might take." (*Id.*)

The ALJ concluded that Rokosa's remarks were unlawful inasmuch as they advised employees that they would not be rehired for 2017 until the election was completed, and If the Union won the election, there would be even further delay. The ALJ correctly found this was, "a powerful and inaccurate antiunion message," (ALJD at 21.) The ALJ's conclusion is well-supported by long-standing Board law. Effectively, Rokosa told employees that their job offers for the upcoming season were being withheld because of their Union activities and they would be subject to further uncertain if the employees voted subject to . The Board has long held that an employer may not manipulate voters by withholding benefits that would have otherwise been provided absent the pendency of an election. *See, e.g., The Gates Rubber Co.,* 182 NLRB 95, 95 (1970). *See also Ann Lee Sportswear, Inc. v. NLRB,* 543 F.2d 739, 743 (10th Cir. 1976) (employer's "freeze on promotions and transfers" violated the Act when it was implemented because of employees' union activity). By informing employees that job offers were being withheld because of the Union election NHRA violated the Act here. Section 8(a)(1) of the Act strictly prohibits precisely this sort of manipulation.

CONCLUSION

For the foregoing reasons, the Charging Party/Petitioner respectfully requests that the Board wholly deny NHRA's Exceptions, affirm the decision of the Administrative Law Judge, adopt his recommended order, and grant any and all further relief as is just and proper.

Dated: New York, New York
Jan. 23, 2019

Respectfully submitted,

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I hereby certify that on January 23, 2019, the foregoing Answering Brief to Respondent's Exceptions was e-filed with NLRB Region 29 and the NLRB Office of the Executive Secretary at www.nlrb.gov, and sent electronically to the following addresses:

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Dated this 23rd day of January 2019